

Massachusetts Wage Act - Discussion - September 2019

Summary:

The fact that a company/officer/owner bears liability for employee benefits in having a 1099 **OR** contract individual, ***even if*** that individual operates as an LLC, and ***even if they have signed a waiver of benefits***, was an eye-opener for many. A ***corporate structure does not shield the officers*** from personal liability here.

In a nutshell, any person who does work for you and is not an employee can sue for benefits, back 3 years and triple damages if *you cannot prove that*:

1. The individual was free from your control
2. The individual was not involved in your normal course of business
3. The individual is normally engaged in performing the kind of service provided to you, to others

Arthur Young was good enough to do some research and his counsel provided the detail below:

I apologize for the long email, but I wanted you to have all of this information before we speak, so I can answer any questions you may have.

Unfortunately, since the Company is based in Massachusetts, there is no quick or easy answer. Massachusetts has one of the strictest tests in the country governing independent contractors, which is set by statute. The Massachusetts statute presumes that individuals performing services for another are employees, unless the entity/business can prove the following three factors (the entity has the burden to show that someone is an independent contractor):

- 1) the individual is *free from control and direction* in connection with the performance of the services;
- 2) the *service is performed outside the usual course of the business* of the employer; and
- 3) the individual is *customarily engaged in an independent trade, occupation, profession or business* of the same nature as that involved in the service performed.

Most companies fail parts 2 and 3 of the test. Your suggestion to hire someone to produce a particular deliverable might work, if the individual is not performing the same type of services as the services performed by a regular employee, in essence, displacing another employee. Thus, if the company has been hired by a client for a particular project that requires unique skills and experience that your current employees do not have, and it retains an individual with that particular expertise as an independent contractor, on a temporary basis for that project only, the classification has some chance of being upheld if it is challenged in court or before an administrative agency (e.g. the Division of Unemployment Assistance or Department of Labor).

However, if the company ends up retaining the individual repeatedly for other projects, or engages him/her over a long period of time, then the relationship starts looking more like an employment relationship (even if it is just part-time employment).

In deciding whether to engage an individual as an independent contractor, you should consider the following factors:

- 1) The nature of the services the individual is expected to perform – are they unique, different from services performed by other employees?
- 2) The number of hours the individual is expected to perform for the company; is the individual required or expected to follow a specific “work” schedule
- 3) The expected duration of the engagement (independent contractors are typically engaged for a brief period of time)
- 4) Whether the individual is already employed or engaged elsewhere (the independent contractor should not derive a significant source of income from your company)
- 5) The reason for retaining the person as an independent contractor, rather than as an employee – e.g. is the individual in business for himself/herself and performing services for other clients? *Note: this is related to factor # 4 above – whether the individual is performing services for other clients is an important factor that a reviewing court or agency will take into consideration.*
- 6) The form of compensation (salary vs hourly – a fee basis is often used for independent contractors, but hourly could work also)
- 7) Whether the independent contractor will be able to perform the services remotely, or required to be on-site. *Independent contractors should be treated differently from employees – they wouldn’t normally get an office or corporate email account and they shouldn’t be required to follow a strict schedule.*
- 8) Will you expect to be able to fire the independent contractor “at will” – this is an indicia of employment
- 9) The individual’s location – both residence and work location
- 10) Any training received in connection with the services
- 11) The tools the individual will use to perform the services

To be clear, the above does not represent an exclusive “check list” or a legal opinion regarding the enforceability of any particular independent contractor arrangement. Each independent contractor relationship will be examined based on the particular facts and circumstances applicable to the individual in question, and no one factor would carry more weight.

In explaining the clearest independent contractor relationship, I typically use the analogy of a company – like Interbit Data – hiring a builder to reconfigure its offices or a videographer to create corporate videos. These folks are performing a service outside the client’s regular business; they are engaged in the particular trade for which their services were retained; and they perform these services for different clients. The closer the independent contractor is to your core business, the higher the likelihood that the independent contractor relationship will be disregarded, even if the individual signed an independent contractor agreement (as you noted, agreement between the parties is useful but not determinative).

With the recent passage of the MA paid family and medical leave law, which requires companies with at least 25 employees to contribute to the state-created fund for paid leave, it is particularly important to not misclassify individuals as independent contractors. And, as you alluded to in your email, an individual who claims he/she was misclassified as an independent contractor will often sue under the Massachusetts Wage Act for unpaid wages (for example, in the form of overtime or unpaid vacation time), which carries the potential for automatic triple damages and individual liability. Finally, despite your best efforts, the risk that an individual might claim he or she was misclassified as an independent contractor cannot entirely be eliminated.

Based on this, if the question is close, my recommendation would be to retain individuals who will be performing work for you on a short-term basis as a temporary employee (for a fixed term) either on a part-time or full-time basis. Individuals who perform work for a short period of time might not be eligible for certain benefits under the terms of your plans or policies, depending on the length of the engagement. If you still want to retain someone as a contractor, to minimize liability you could:

(1) Retain them through a temporary/staffing agency (in which case, the individual will be the employee of the agency). *You will need to make sure that the agency fulfill all obligations due under the applicable employment laws, including the timely payment of wages, as the company would likely be deemed a joint employer of that individual;* or

(2) Retain the individual through his/her LLC or other corporate entity, i.e. if the individual has their own company, you can contract with that company instead of the individual directly. (This would not necessarily be determinative to the analysis – as I mentioned, all the underlying facts and circumstances would be analyzed – but this would be helpful).

In either case, engaging a non-employee should be done only on a temporary, limited basis.

Finally, if you decide to contract with an independent contractor located outside of Massachusetts, we should review your independent contractor agreement carefully to make sure that it sufficiently protects you. For example, in most cases the agreement should provide that the law of the state in which the individual resides– NOT Massachusetts law – governs, because most other state laws other than California are more lenient in this area. (There is at least one MA case dealing with an out-of-state resident, in which the resident was able to sue a Massachusetts company in MA, under the MA wage payment law – and therefore recover triple damages – based on the choice of law provision in the contract.)

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